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Comments

Divorce Reform: Pennsylvania Attempts to Break with the Past

I. INTRODUCTION

In the past ten years, few areas of the law have been the subject of such criticism and modernization as that dealing with divorce or divorce related issues.¹ Since the institution of no-fault grounds in California in 1969,² state after state has reformed its divorce law to better deal with contemporary family problems.³ This change was warranted not only by the enormous increase in the divorce rate,⁴ with the corresponding additional burden on the courts, but more specifically, by the realization that the procedure which most states utilized prior to 1969—the fault system⁵—was having disastrous effects on the spouses, their families, and the judicial system.⁶ Nevertheless, Penn-

1. See, e.g., Cannell, *Abolish Fault-Oriented Divorce in Ohio—As a Service to Society and to Restore Dignity to the Domestic Relations Court*, 4 AKRON L. REV. 92 (1971); Clark, *Divorce Policy and Divorce Reform*, 42 U. COLO. L. REV. 403 (1977); Goldstein & Gitter, *On Abolition of Grounds for Divorce: A Model Statute and Commentary*, 3 FAM. L.Q. 75 (1969) [hereinafter cited as Goldstein & Gitter]; Note, *Are Fault Requirements in Divorce Actions Unconstitutional?*, 16 J. FAM. L. 265 (1977).

2. CAL. CIV. CODE § 4506 (West 1970).

3. As of January 1, 1980, only Illinois, Pennsylvania and South Dakota had failed to adopt some type of no-fault provision.

4. In 1910, 948,000 marriages and 83,000 divorces were recorded in the United States. Preliminary figures for 1978 show that the rate has increased to 2,243,000 marriages and 1,122,00 divorces. BUREAU OF THE CENSUS U.S. DEPT. OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 60 (100th ed. 1979). Pennsylvania began recording divorces in 1944, and found in that year that 10,320 divorces were granted and 62,412 marriages were performed. In 1978 the divorce statistic had risen to 38,261 and marriages had climbed to 92,682. BUREAU OF HEALTH DATA SYSTEMS, PA. DEPT. OF HEALTH, PENNSYLVANIA MARRIAGE AND DIVORCE STATISTICS, 1978, at 3, 29 (1979) [hereinafter cited as PA. MARRIAGE AND DIVORCE STATISTICS].

5. The "fault system" refers to those systems which require that the moving party prove that the other spouse was guilty of some marital misconduct (fault) which would justify the granting of a divorce. "No-fault" does not require this finding of fault. Most no-fault statutes consist of one or a combination of the following: (1) the court determines that the marriage is dead; (2) the spouses agree that the marriage is dead; (3) after living separate and apart for a required statutory period, one spouse may unilaterally terminate the marriage. See, e.g., CAL. CIV. CODE § 4506 (West 1970); MISS. CODE ANN. § 93-5-2 (Supp. 1979); N.J. STAT. ANN. § 2A: 34-2 (West Supp. 1979).

6. See notes 64-77 and accompanying text *infra*.

sylvania remained steadfast in permitting a divorce to be granted only upon a showing of fault of one of the spouses.

In Pennsylvania, as in the other forty-nine states, divorce is a creature of statute. Although only the courts can grant a divorce,⁷ the sole grounds for doing so are defined by the legislature.⁸ The power to terminate a marriage and to establish the grounds by which a marriage could be dissolved has been upheld as a valid exercise of the police power of the states.⁹ Until recently, a divorce could be granted in Pennsylvania only when one or more of the following ten grounds had been proven: impotency, bigamy, adultery, desertion, cruelty, indignities, fraud, conviction of certain crimes, marrying within the prohibited degrees of consanguinity or affinity, and insanity.¹⁰

The state's overriding interest in protecting the public welfare—by encouraging family stability—has been the argument most often asserted in defense of the fault system in Pennsylvania.¹¹ The fault system makes divorces difficult to obtain,¹² and it at least theoretically follows that the marriage and the family are protected. However, this defense fails to view the marital relationship realistically. It erroneously assumes that if no fault can be shown a working marriage exists, and if a marriage is not working it is due to the fault of one of the spouses.¹³ Furthermore, the vitality of this defense seems to wane when analysis focuses upon the serious problems generated by the fault system. Not only does the system tend to foster perjury on the part of the parties to the divorces,¹⁴ but it also encourages both migratory divorces¹⁵ and disdain for the judicial system.¹⁶ Perhaps the most significant drawback of such a system, however, is that it intensifies the ill feelings between the two spouses not only at the time of the divorce itself, but in the future as well.¹⁷

These problems have not gone unnoticed by Pennsylvania's legislators. Numerous attempts have been made in the past years to

7. See PA. CONST. art. 3, § 32 (prohibits special laws). See also *Darcy v. Darcy*, 197 Pa. Super. Ct. 100, 176 A.2d 919 (1962); *Lannamann v. Lannamann*, 171 Pa. Super. Ct. 147 89 A.2d 897 (1952).

8. For the various grounds for divorce that existed in Pennsylvania prior to the enactment of the new Divorce Code of 1980, see PA. STAT. ANN. tit. 23, § 10 (Purdon 1955 & Supp. 1979). See also text accompanying note 10 *infra*.

9. *Boddie v. Connecticut*, 401 U.S. 371 (1971).

10. See note 8 *supra*.

11. See note 81 and accompanying text *infra*.

12. See notes 61-62 and accompanying text *infra*.

13. See notes 59-60 and accompanying text *infra*.

14. Goldstein & Gitter, *supra* note 1, at 79-80.

15. *Id.*

16. *Id.*

17. *Id.* at 81.

reform the divorce law, but all have proved unsuccessful.¹⁸ On April 2, 1980, however, a divorce reform provision was finally signed into law, thus becoming the first major change in Pennsylvania's divorce law in nearly two hundred years.¹⁹ Although the new Divorce Code definitely improves this area of family law by easing the pain and inequities which had become inherent in the old divorce law, it is by no means the best possible solution. This comment will analyze the new Divorce Code. Its weak points will be exposed and possible improvements suggested. Attention will be given to the grounds for divorce, which include the old fault grounds²⁰ as well as two no-fault provisions: one allowing a divorce to be granted where both spouses agree that the marriage is irretrievably broken²¹ and the other authorizing a divorce to be granted on the petition of one of the spouses where the parties have lived separate and apart for three years or more and the court finds the marriage to be irretrievably broken.²² Additionally, the comment will explore those provisions which, for the first time in this commonwealth,²³ authorize alimony awards, and which provide for an equitable distribution of marital property.²⁴

II. GROUNDS FOR DIVORCE PRIOR TO THE NEW DIVORCE CODE

Fault grounds have been the cornerstone of this commonwealth's divorce laws from the outset. The first divorce law enacted in Pennsylvania provided for absolute divorce on the grounds of impotency, bigamy, adultery, desertion or marriage on false rumor of death.²⁵ Also included within this initial statute were the grounds of abandonment, cruel and barbarous treatment and indignities to the person, all of which were available only to a wife when suing her husband for a

18. Pa. S.B. 342, 161st Sess. (1977); Pa. S.B. 404, 161st Sess. (1977); Pa. S.B. 1452, 160th Sess. (1976); Pa. H.B. 2376, 160th Sess. (1976); Pa. H.B. 1657, 159th Sess. (1975).

19. Act of April 2, 1980, No. 26, 1980 Pa. Legis. Serv. 56. See notes 25-28 and accompanying text *infra*.

20. See text accompanying note 10 *supra*. Note however that the grounds of impotency, fraud, marriage within prohibited degrees of consanguinity and affinity, and false rumor of death have been deleted as grounds for divorce in the new Code. While the first three are now grounds for annulment, Act of April 2, 1980, No. 26, §§ 204(a)(2), (4), (5), 1980 Pa. Legis. Serv. 52-53, the false rumor ground has been deleted from the Divorce Code. The only other change in the new legislation concerning fault grounds is that the period of desertion has been reduced from two years to one year. *Id.* § 201(a)(1), 1980 Pa. Legis. Serv. 51.

21. Act of April 2, 1980, No. 26, § 201(c), 1980 Pa. Legis. Serv. 51.

22. *Id.* § 201(d).

23. *Id.* §§ 501-507, 1980 Pa. Legis. Serv. 58-60.

24. *Id.* §§ 401-404, 1980 Pa. Legis. Serv. 55-58.

25. Divorce and Alimony Act of 1785, c. 1176, 1781-1790 Pa. Laws 343.

divorce from bed and board (legal separation). In 1815 the divorce law was recodified. The only change was that the period of desertion was reduced and cruelty and indignities were added as grounds for an absolute divorce.²⁶ The present divorce law was enacted in 1929, making only insignificant changes to the 1815 version,²⁷ and has remained substantially unchanged since that time.²⁸

That Pennsylvania has retained its fault system substantially intact for almost two hundred years does not necessarily mean that all the grounds have been equally utilized. The ground of indignities has been by far the most common basis for a divorce in this commonwealth.²⁹ Since most of the fault grounds have been retained under the new Divorce Code³⁰ there is no reason to believe that indignities will not

26. Act of March 13, 1815, c. 109, 1815 Pa. Laws 150.

27. The remaining grounds of fraud and conviction of certain crimes were added in 1854. Act of May 8, 1854, No. 629, 1854 Pa. Laws 644. Marriage within the prohibited degrees of consanguinity or affinity was added as a ground for divorce with the enactment of the 1929 Divorce Law.

28. Since its enactment, the only change in the present divorce law has been an amendment which allows a divorce to be granted where the defendant spouse has been confined to a mental institution for three years prior to the filing of the complaint, and there appears to be no reasonably foreseeable prospect of the defendant being released from inpatient care within three years from the date of the filing. See PA. STAT. ANN. tit. 23, § 10(4) (Purdon Supp. 1979). Prior to the enactment of this amendment in 1972, insanity of a spouse was not an independent ground for divorce. Even though the 1972 amendment changed that concept, only one case has been reported under this section as of this writing. *Rome v. Rome*, 35 Beaver Co. L.J. 1 (1975) (divorce granted). This is probably because of the strict requirements of the section and the fact that few physicians are willing to predict that there is no reasonably foreseeable prospect of being discharged within the next three years. Raphael, *Divorce in America: The Erosion of Fault*, 81 DICK L. REV. 719, 723 n.18 (1977) [hereinafter cited as Raphael].

29. In 1978, the distribution by grounds for divorces and annulments in Pennsylvania was as follows:

Legal Grounds for Decree	Total	Divorces	Annulments
TOTAL	38,261	38,165	96
Indignities	34,584	34,578	6
Desertion	2,517	2,517	—
Cruelty	352	352	—
Conviction of Crime	54	54	—
Bigamy	32	12	20
Adultery	37	37	—
Fraud	9	8	1
Impotency	4	3	1
Coercion or Incestuous Marriage	1	1	—
Miscellaneous	78	17	61
Not Stated	593	586	7

PA. MARRIAGE AND DIVORCE STATISTICS, *supra* note 4, at 29 (Table 22).

30. See note 20 and accompanying text *supra*.

continue to be the most widely utilized fault ground. Thus, because the indignities ground should continue to be an integral part of the divorce law under the new Divorce Code, an examination of some of the legal issues that have arisen in connection with the indignities ground should be relevant to future divorce actions.

Nearly all of the divorce actions filed in Pennsylvania prior to the new Divorce Code were based upon the ground of indignities.³¹ Both the old statute and the new Code state simply that an action can be maintained by the injured and innocent spouse where he has suffered such indignities as to make his condition intolerable and life burdensome. However, no definition of indignities is expounded in the statute, and just what constitutes an indignity has been left to judicial determination based upon the particular facts of each case. Nevertheless, it has been stated that indignities can consist of vulgarity, unmerited reproach, habitual humiliating treatment, studied neglect, intentional uncivility, manifest disdain, abusive language, malignant ridicule, and every other manifestation of settled hate and estrangement; but slight or irregular acts of misconduct are insufficient.³² Consequently, it has been held that incompatibility, nagging,³³ bad temperment, domestic insufficiency and refusal of sexual intercourse³⁴ do not establish grounds for divorce.

31. Raphael, *supra* note 28, at 724.

32. *Mintz v. Mintz*, 258 Pa. Super. Ct. 187, 392 A.2d 747 (1978) (divorce granted where wife constantly berated husband, told others husband was sinful, insisted that he follow her rules around the house, would not socialize with husband's family or friends, and denied husband sexual relations). See *Melli v. Melli*, 253 Pa. Super. Ct. 286, 384 A.2d 1347 (1978).

33. Compare *Edstrand v. Edstrand*, 206 Pa. Super. Ct. 413, 212 A.2d 921 (1965) (divorce denied where complaint alleged petty quarrels and nagging as grounds) with *Mintz v. Mintz*, 258 Pa. Super. Ct. 187, 392 A.2d 747 (1978) (nagging, while not itself a ground for divorce, can be taken into consideration since it evidences settled hate and estrangement).

34. *Simons v. Simons*, 196 Pa. Super. Ct. 650, 176 A.2d 105 (1962). But see FREEDMAN & FREEDMAN, *LAW OF MARRIAGE AND DIVORCE IN PENNSYLVANIA* § 319 (2nd ed. 1957) [hereinafter cited as *MARRIAGE AND DIVORCE*] where the authors state that adherence to such a rule is incongruous since state policy encourages procreation pursuant to marriage, and impotency is a ground for divorce, although refusal of sex, which is fundamentally the same situation, is not. Additionally, such conduct fulfills all the requirements of indignities. It is intentional, continuous, directed toward the innocent party and shows settled hate and estrangement.

At least one court has rejected the traditional principle and permitted a divorce where sexual relations were refused:

We cannot help but believe that the refusal of sexual intercourse by a wife to the average sensitive husband for a period of nine years while he furnished her with a home and paid all her bills is more of an indignity to him than calling him an unkind name which we have so freely accepted as an indignity.

Shaffer v. Shaffer, 30 Somerset 219, 225 (1975).

The libellant in an action based on indignities must establish a continuity of ill conduct by the respondent and can never be granted a divorce based simply on one incident. No length of time has been established within which this conduct must continue, for the test centers upon the continuity and severity of the indignity and not the period of conduct. A divorce can be granted for indignities based upon mental violence, and indignities may be also committed by negative conduct, such as isolating the innocent party so as to render his condition intolerable and life burdensome.³⁵ False accusation of adultery or other humiliating charges may, if continually made so as to establish a course of conduct, constitute indignities. However, for the divorce to be granted, the charge must be false and may not be a good faith accusation based upon a reasonable suspicion.³⁶ It should be noted that while certain accusations made between the spouses privately may not be sufficient to make the innocent spouse's condition intolerable and life burdensome, those same statements if made in public may be sufficient to support a divorce.

Provocation and retaliation are applicable to indignities, as they are to the other fault grounds of divorce. Therefore, if the libellant provoked the indignities from the respondent a decree will not be granted,³⁷ provided that the retaliatory indignities were not unreasonable. Additionally, where provocation is asserted, the respondent has the burden to show that the retaliation was not excessive. The courts in this situation, as in deciding whether the facts are severe enough to render a condition intolerable and life burdensome, are not constrained by strict legal principles applicable to courts of law, and can, therefore, take into account the sensitivities of the particular parties.³⁸

Mere continuance of cohabitation of sexual intercourse during the time of the alleged wrongful conduct is not a bar to a divorce based upon indignities.³⁹ This is so because the statute requires that a course

35. *Clements v. Clements*, 21 Pa. D. & C. 661 (Phila. 1934) (husband's refusal to sleep, eat, talk with his wife or go out with her socially constituted an indignity by husband which negated the wilful and malicious aspect of wife's desertion).

36. *Riley v. Riley*, 246 Pa. Super. Ct. 265, 369 A.2d 1314 (1976), *allocatur denied* (1977).

37. *Melli v. Melli*, 253 Pa. Super. Ct. 286, 384 A.2d 1347 (1978) (divorce denied where respondent wife was alleged to have thrown a drink at her husband, slapped him, used vulgar language and embarrassed him and refused to perform household duties, since husband's conduct could constitute indignities on his part). See also *Sieno v. Sieno*, 163 Pa. Super. Ct. 479, 61 A.2d 778 (1948).

38. *Albrecht v. Albrecht*, 176 Pa. Super. Ct. 626, 109 A.2d 209 (1954).

39. Prior to 1923, the law required that for a wife to maintain an action for divorce based on indignities, she must have been forced to withdraw from her husband's house due to his conduct. Act of March 13, 1815, c. 109, 1815 Pa. Laws 150. This requirement was abolished in 1923. Act of June 28, 1923, No. 340, 1923 Pa. Laws 886.

of conduct be established, and if the individual actions of the respondent were examined separately, they might not be sufficient to support a decree. Even if the ill treatment ceases completely, the suit is not barred, but a lengthy cohabitation would be considered when determining if the respondent's action really made life burdensome.

Indignities was utilized most often in divorce proceedings because it was the easiest of the grounds under which to obtain a divorce. Moreover, if an additional ground is pleaded and fails, very often the evidence used to support that ground could be considered as contributory to the ill conduct required under indignities. Finally, indignities was utilized most frequently and will continue to be the fault ground pleaded most often, because it appears that under this ground, the judges have the most leeway to shape the result which they feel is necessary.

The elements necessary to obtain a divorce under the indignities ground are representative of the other fault grounds upon which a divorce may be predicated. As is discussed below, the adversarial nature of divorce proceedings based upon these fault grounds not only breeds contempt and ill feeling between the involved spouses, but also places a strain upon the judicial system, and upon the judge called on to decide the appropriateness of a divorce decree.

III. FAULTS OF THE FAULT SYSTEM

Pennsylvania has essentially maintained the same grounds for divorce since the original divorce law was enacted in 1785. In so doing, this commonwealth has perpetuated the social policy reasons which formed the basis of that first divorce law. The criticism most often leveled against the fault system of divorce is that such a system has been unable to free itself from these ancient policies and adjust to the changing attitudes and ideals of modern society.⁴⁰

The most salient of all of the policy reasons underlying the fault system is that its justification rests upon an assumption that difficulties within the marriage relationship can be assigned to the faults of one of the parties. This justification ignores the realities associated with a marital relationship in modern society. The breakdown of a marriage results from the complex interactions of two or more personalities, and not from the actions of only one party.⁴¹ Moreover, it is difficult to know what conduct, perhaps subtle and unintentional, of

40. See Goldstein & Gitter, *supra* note 1, at 79; Raphael, *supra* note 28, at 728. See also Note, *The No-Fault Concept: Is This the Final State in the Evolution of Divorce?*, 47 NOTRE DAME LAW. 959, 965 (1972) [hereinafter cited as *No-Fault Concept*].

41. Goldstein & Gitter, *supra* note 1, at 79.

the "innocent" party may have provoked the allegedly "guilty" party to act.

Coupled with the misconception that marital discord is due to the fault of only one of the parties is the presumption that if no fault can be demonstrated, a happy and viable marriage exists.⁴² Marriages, however, break down due to psychological pressures and anxiety created by both parties, and the faults alleged are usually only the manifestations of a dead marriage rather than the cause of the marital breakdown.⁴³

A third defense of the fault system of divorce has been the idea that the state has an overriding interest in promoting the public welfare by encouraging family stability. Under this rationale, the state is an "unnamed third party"⁴⁴ to every divorce action in this commonwealth. Only where compelling reasons are shown by clear and convincing evidence will a decree issue. The courts are quite strict in assuring that a divorce is granted only on the statutory grounds and only to an "innocent and injured" party.⁴⁵

Based on these policies, Pennsylvania has recognized several defenses to a divorce action that will prohibit a decree from issuing even though the moving party has shown the fault of his or her spouse. The defenses of connivance, condonation and recrimination are the statutory defenses, which apply only to the ground of adultery.⁴⁶ Connivance is the corrupt assent of one party to the commission of the adulterous acts of the other. Condonation is the eradication of the offense by resumption of the marital status after the injured spouse has learned of the adultery. Of these two defenses, connivance would seem to be more justifiable, since it is unfair to permit a spouse to terminate a marriage because of a situation to which he or she agreed. Condonation, on the other hand, would appear to contravene the commonwealth's policy of promoting family stability, since it stands in the way of any attempted reconciliation between the parties. No true attempt at reconciliation could exist without a full resumption of marital

42. *No-Fault Concept*, *supra* note 40, at 965.

43. See Note, *Does No-Fault Divorce Portend No-Fault Alimony?*, 34 U. PITT. L. REV. 486, 494 (1973) [hereinafter cited as *No-Fault Alimony*].

44. *Mirarchi v. Mirarchi*, 226 Pa. Super. Ct. 53, 311 A.2d 698 (1973); *Deussing v. Deussing*, 224 Pa. Super. Ct. 525, 307 A.2d 382 (1973). See also *No-Fault Concept*, *supra* note 40, at 966 (suggests that since women have become able to function separately and independently, the state's interest in protecting the marital relationship is deemed to be small). *Accord*, *Volid v. Volid*, 6 Ill. App. 3d 386, 286 N.E.2d 42 (1972).

45. *Rensch v. Rensch*, 252 Pa. Super. Ct. 294, 381 A.2d 925 (1977); *Ryave v. Ryave*, 249 Pa. Super. Ct. 78, 375 A.2d 766 (1977); *Mirarchi v. Mirarchi*, 226 Pa. Super. Ct. 53, 311 A.2d 698 (1973). See also notes 61-62 and accompanying text *infra*.

46. PA. STAT. ANN. tit. 23, § 52 (Purdon 1955).

relations; yet, if the innocent spouse attempts to forgive but soon finds this impossible, that spouse is not entitled to a divorce based upon adultery.⁴⁷ Under this condition, spouses may actually have bypassed reconciliation so as not to lose their right to divorce. Therefore, the defense appears to thwart rather than to support the idea of family stability.

Of the three statutory defenses to a divorce action based on adultery, that of recrimination is the most reprehensible. Under this defense, a spouse who is guilty of adultery is precluded from raising the other spouse's adultery as a ground for divorce. Thus, the commonwealth forces two people, who have plainly shown that their marriage means nothing to them, to remain man and wife. The underlying rationale for this defense is that the parties are "suitable and proper companions" for each other.⁴⁸ None of the views put forward in support of recrimination justify the continued viability of this defense in Pennsylvania. One view is that the courts will not declare a divorce in favor of a party who has unclean hands.⁴⁹ If this were the policy followed in this commonwealth, then the defense of recrimination would be applicable to all grounds of divorce. At present, it is applicable only where adultery is alleged.⁵⁰ Another view is that divorce is not to be encouraged, and that it is for the public good to keep marriages together. Under this argument, however, divorce is seen as a reward for the innocent and a punishment for the guilty,⁵¹ a result which is in fact contrary to the policy of the public good, since it requires continuance of a marriage that has been doubly broken. Under Pennsylvania law, therefore, judges are required to cover their eyes and to maintain the misconceptions that since the marriage exists *de jure*, it is operative *de facto*. Finally, it has been said that the existence of the recrimination defense deters immorality, because the threat of not be-

47. *Commonwealth v. Sanders*, 187 Pa. Super. Ct. 494, 144 A.2d 749 (1958) (divorce denied where it appeared from the evidence that two months prior to the commencement of the divorce action the libellant husband had spent several weekends with his adulterous wife).

48. MARRIAGE AND DIVORCE, *supra* note 34, at § 347.

49. *Id.* See also Moore, *A Critique of the Recrimination Doctrine*, 68 DICK. L. REV. 157, 162 (1964) [hereinafter cited as Moore], where the author states that if the "clean hands" doctrine is to be used in divorce proceedings then it should be employed, as in other situations, only where it would not produce an unwise or unjust result.

50. See *Berezin v. Berezin*, 186 Pa. Super. Ct. 340, 142 A.2d 741 (1958) (recrimination held not applicable where divorce based on desertion); *Shoemaker v. Shoemaker*, 199 Pa. Super. Ct. 61, 184 A.2d 282, *allocatur denied* (1962) (recrimination held not applicable where divorce based on indignities); *Murphy v. Murphy*, 204 Pa. Super. Ct. 576, 205 A.2d 647 (1964) (recrimination is not a defense where ground alleged for divorce is conviction of a crime). See also note 46 *supra*.

51. See *No-Fault Concept*, *supra* note 40, at 963.

ing able to obtain a divorce renders a party less likely to commit adultery.⁵² This would appear to be of little deterrence, for the adulteror does his deed with the expectation that the other spouse will not learn of his action and merely accepts the possibility that he may get caught. Additionally, recrimination may actually promote immorality. If the court denies a divorce to two people who are unwilling or unable to live together, it is foolish to think that their emotional and physical needs will die along with their marriage,⁵³ and the result will be that they will satisfy their needs outside the marital relationship.

In addition to the express statutory defenses available in a divorce action based on adultery, the courts in Pennsylvania have applied several defenses to divorce actions generally. Of these judicial defenses the two most important are the "injured and innocent" requirement and the defense of provocation. Similar to the idea of recrimination, the courts will deny a divorce on the grounds of indignities or cruelty where both parties are so nearly at fault as to prevent them from being considered injured and innocent.⁵⁴ Additionally, acts of the party contesting the divorce will not be deemed sufficient for the granting of a divorce if those acts were in response to provocation by the party seeking the divorce.⁵⁵ As with the statutory defenses, the judicial defenses tend to frustrate the underlying policy of divorce law. If the situation has deteriorated to the point at which a divorce action with mutual fault accusations is necessary, the commonwealth only aggravates the situation by requiring the two parties to continue the marital relationship.

One possible solution to the problems associated with the application of the judicial and statutory defenses to divorce proceedings would be the adoption of the doctrine of comparative rectitude. Under that doctrine, courts are required to weigh the misconduct of both parties and to grant a divorce to the party least at fault, even though both may have demonstrated grounds for divorce.⁵⁶ The adoption of this type of defense system, which would necessarily lead to the abolition of the archaic defenses now recognized, would not only allow for flexibility in an area of the law where it is much needed,⁵⁷ but would also resolve dead marriages rather than prolong them.

52. Moore, *supra* note 49, at 159.

53. See *id.* at 165.

54. See, e.g., *Elfert v. Elfert*, 219 Pa. Super. Ct. 373, 281 A.2d 657 (1971); *Rankin v. Rankin*, 181 Pa. Super. Ct. 414, 124 A.2d 639, *allocatur denied* (1956).

55. *Rensch v. Rensch*, 252 Pa. Super. Ct. 294, 381 A.2d 925 (1977). However, a divorce will be granted when the retaliatory action by the respondent spouse exceeds the provocation.

56. See MARRIAGE AND DIVORCE, *supra* note 34, at § 347.

57. Note that the new Divorce Code both specifically includes fault grounds and re-

Pennsylvania's adherence to its outdated policy rationale, coupled with the defenses which have arisen under the fault system, has led to some perhaps not so unexpected results. The most salient of these results has been the substantial increase in the number of "migratory divorces."⁵⁸ Under the fault system of divorce, migratory divorces are encouraged. Without an alimony provision in Pennsylvania prior to the new Divorce Code, one party to the marriage could obtain a divorce in the neighboring no-fault states⁵⁹ and then return to Pennsylvania, thus avoiding any financial obligations to his spouse. This migratory divorce scheme is detrimental to both the divorced spouse, who may be left without adequate financial resources, and to the taxpayers of this state, who may be forced to support the divorce spouse.

Another result which the old fault system encouraged was the creation of illicit relationships between the spouse seeking the divorce and another partner. If one spouse was unwilling to allow the other to obtain a divorce, that spouse was not likely to bring an action for a divorce based on adultery, even if there was positive proof of the illicit relationship. Not only was the original marriage unable to be terminated, but the possibility existed that an illegitimate family might ultimately be established.⁶⁰ Neither result furthered Pennsylvania's policy of preserving the family unit.

Judges in Pennsylvania have not been totally unresponsive to the need for change in the divorce law. Perhaps in response to continuing pressure from various groups and to combat the results of the fault system, the courts began to liberally interpret the existing law. The most significant steps in this area were the relaxation of the requirement that a divorce be granted only to an "innocent and injured spouse." While the courts have long recognized that this does not require the moving party to be totally free from fault,⁶¹ the level of fault which this party can possess has been steadily increasing.⁶²

tains the prior defenses. This seems all the more reason why comparative rectitude should be implemented as soon as possible.

58. Migratory divorce is the common name given to those divorces which a spouse obtains in another state after meeting that state's residency requirements.

59. Ohio requires only a six-month residency, *see* OHIO REV. CODE ANN. § 3105.03 (Page 1980), and New Jersey mandates a one-year residency requirement before the divorce action is commenced, *see* N.J. STAT. ANN. § 2A:34-10 (West Supp. 1979). The use of migratory divorce is widespread, since Pennsylvania's two largest cities are relatively close to these borders. Spouses seeking divorces set up residence in these sister states and still maintain their jobs within Pennsylvania with relative ease.

60. *See No-Fault concept, supra* note 40, at 965 (citing NEW JERSEY FINAL REPORT OF DIVORCE LAW STUDY COMMISSION 7-10 (1970)).

61. *Rensch v. Rensch*, 252 Pa. Super. Ct. 294, 381 A.2d 925 (1977); *Bonawitz v. Bonawitz*, 246 Pa. Super. Ct. 257, 265, 369 A.2d 1310, 1313 (1976); *Gray v. Gray*, 220 Pa. Super. Ct. 143, 147, 286 A.2d 684, 687 (1971).

62. *See O'Leary v. O'Leary*, 399 A.2d 765 (Pa. Super. Ct. 1979) (husband found to be

It appears that the courts will attempt to grant a divorce whenever the situation truly requires that result, and when that result can be achieved without totally contravening the language of the statute.⁶³ Under the old divorce law, "just" results were often achieved through a liberal interpretation of the statutory language. Unfortunately, that language was not susceptible to liberal application in all situations. In those cases in which judges perceived the statute as a barrier to the achievement of a just result, the statute was outwardly criticized.⁶⁴ These criticisms exemplify many of the problems associated with the fault system, and demonstrate that even a liberal interpretation of the statutory provisions may not totally solve the problems.

Paramount among those problems is the encouragement of perjury. In the absence of the necessary statutory grounds, the parties often negotiate for a favorable settlement and then allow the divorce to proceed uncontested. Since one party is not there to contest, this actually gives the moving spouse the freedom to "create" grounds for divorce.⁶⁵ Most lawyers and judges who deal with these proceedings are aware of this shortcoming,⁶⁶ yet continue to administer the system. Not only are these officers of the court perceived as parties to the deceit, but

injured and innocent spouse even though he admitted to his wife that he had sexual relations with other women during their marriage, and he had accompanied a friend's wife and children to Florida for a weekend during the marriage).

63. See *Steinke v. Steinke*, 238 Pa. Super. Ct. 74, 357 A.2d 674 (1975). There, a wife sought a divorce on the grounds of indignities due to her husband's attempt to have a sex change operation. He appeared in public many times dressed in women's attire and started to adopt a feminine appearance due to hormones he was taking. The lower court denied a divorce because it reasoned that the husband's conduct was the result of mental illness, was unintentional and lacked the spirit of hate and estrangement necessary for indignities. The superior court reversed, holding that the husband's conduct was not the result of mental disorder, but rather was the "indulgence of a private fantasy," and granted the divorce. *Id.* at 82, 357 A.2d at 678.

64. *Gray v. Gray*, 220 Pa. Super. Ct. 143, 147 n.4, 286 A.2d 684, 686 n.4 (1971) ("This case illustrates the difficulty under which our legal system labors due to the refusal of the Pennsylvania legislature to reform our domestic relations law. . . . A divorce statute which allowed for divorce without the assignment of fault is the logical solution and we hope the legislature is not tardy in considering such a measure."); *Kern v. Kern*, 33 Lehigh L.J. 486, 487 (1970) ("Admittedly, this court has liberally construed the archaic and unrealistic divorce laws in Pennsylvania in order to do practical justice in the time in which we live. Decrees in divorce have been granted in uncontested cases where indignities under existing law have been weak indeed.").

65. See *Goldstein & Gitter*, *supra* note 1, at 80. This is done even though the petition must aver that, in fact, the divorce is not collusive between the two spouses. It should be noted, however, that collusion is often difficult to prove unless one of the spouses himself alleges it.

66. See Note, *Florida's No-Fault Divorce: Is It Really No-Fault?*, 4 FLA. ST. U.L. REV. 504, 507 (1976) [hereinafter cited as *Florida's No-Fault*].

nothing has been done to alleviate this problem, which can only foster disrespect for the entire divorce proceeding.

A system based on fault also tends to eliminate any chance the parties might have at a reconciliation. Once the complaint is filed, and the parties start pointing an accusatory finger at each other, the real reasons for the breakdown of the marriage are only aggravated. The parties are drawn further and further apart and little time is devoted toward reconciliation.⁶⁷ Furthermore, the hatred and bitterness which the fault system creates often prevents amicable relations between the parties after the divorce.⁶⁸ Such relations are vitally important and must be established, especially if children are involved. Otherwise, the loyalties of the children become weapons for each parent to use against the other. A system which produces such adverse reactions contravenes the commonwealth's policy of protecting the family unit.

The third problem with the fault system of divorce is that by utilizing that system the spouses are obligated to expose, not only to their lawyers, but perhaps in open court, the intimacies of the marital relationship. It has been posited that such exposure is irrelevant to any state interest.⁶⁹ Indeed, the United States Supreme Court has found an invasion of marital privacy to be repulsive to traditional notions and values of marital life.⁷⁰ Chances that only a limited exposure may be made are slim, since the master, appointed by the court, is under a duty to require the presentation of all relevant testimony so that a divorce may not be obtained by imposition. Even if the invasion of privacy could be seen as justifiable under the fault system, it has been questioned whether the courts have the resources or expertise necessary to make an accurate finding of fault.⁷¹

Furthermore, at least one commentator has posited that the effects created by a divorce system based on fault are discriminatory as to the poor.⁷² With the emergence of migratory divorces,⁷³ spouses who have

67. The new Divorce Code attempts to alleviate this problem not only by instituting no-fault grounds but by additionally requiring a ninety-day cooling off period between the filing of the complaint and the commencement of proceedings. During this period, professional counseling can be authorized if one spouse so requests. See notes 118-128 and accompanying text *infra*.

68. See Goldstein & Gitter, *supra* note 1, at 81.

69. *Id.* at 82.

70. *Griswold v. Connecticut*, 381 U.S. 479 (1965). Even though *Griswold* involved unauthorized state invasion, and a party seeking a divorce could be seen to have authorized an exposure of marital privacy, under the present system this authorization could be viewed as compelled, since this is the only way to escape a dead marriage.

71. Hill & Stogel, *Family Law*, 1976 ANN. SURVEY AM. L. 359, 363 [hereinafter cited as Hill & Stogel]. See also Goldstein & Gitter, *supra* note 1, at 77-80.

72. See *Florida's No-Fault*, *supra* note 66, at 507.

73. See notes 58-59 and accompanying text *supra*.

the money to establish residence in a sister state can obtain a divorce under that state's no-fault statute. The poor, who cannot afford this luxury, are left either to cope with the fault system or to resort to the "poor man's divorce" of desertion.⁷⁴ Additionally, the fault system tends to make divorce more expensive than the no-fault systems, with a possible discriminatory effect on the low income families.⁷⁵

Finally, the inadequacy of the fault system has caused many competent lawyers to refrain from the practice of family law. Understandably, a system which is marred by hypocrisy and perjury is appealing to very few. Moreover, the family lawyer is called upon to be a combination of social psychologist, marriage counselor and tax specialist. With the need for such expertise, it is unfortunate that many lawyers are abandoning the practice of family law.⁷⁶ By abolishing the fault system altogether, not only will dignity be restored to family law, but more attorneys will be willing to handle divorce matters. More time could be spent on an attempt at counseling and conciliation in an unemotional and impartial atmosphere, rather than in searching for evidence of fault, or in attempting to place blame on one or the other party. The emphasis will turn from the question of "*can* I get a divorce" to "*should* I get a divorce," which should have been the focus from the very beginning.

In short, Pennsylvania's fault system of divorce presented a multitude of problems and did not effectuate the policies upon which it was based. These problems associated with the fault system of divorce were not unique to Pennsylvania, and have been succinctly summarized as follows:

Perhaps in no other area has the discrepancy between law in dogmatic theory and law in action, evading dogma by fiction and subterfuge, become so marked as in divorce law. The withered dogma that divorce can be granted only for marital fault, variously and eccentrically defined from state to state, is rendered still more irrational by the widespread rule that recrimination is an absolute defense. The result has been triumph, not for dogma, but for hypocrisy. Rules insensitive to reality have been cynically circumvented by litigants and attorneys, with the tacit sanction of the courts.⁷⁷

The solutions to the problems inherent in Pennsylvania's fault system are not simple. Their formulation involves the careful weighing of various social, political, ethical and moral interests which the divorce

74. See *Florida's No-Fault*, *supra* note 66, at 507.

75. *Id.* at 507 n.31.

76. Cannell, *supra* note 1, at 100-02.

77. Traynor, *Law and Social Change in a Democratic Society*, 1956 U. ILL. L.F. 230, 236.

system can affect. The Pennsylvania legislature, however, has recently taken a long overdue step toward the reformation of this commonwealth's divorce law by adopting a new Divorce Code.

IV. THE NEW PENNSYLVANIA DIVORCE CODE: A PARTIAL SOLUTION

On July 1, 1980, a new Divorce Code became effective in Pennsylvania.⁷⁸ The provisions of the new Divorce Code radically change the entire area of family law in this commonwealth. Not only are provisions for alimony and counseling included in the new legislation, but two new grounds for divorce are added, as well as a section completely revising the method of property distribution.

In setting forth the grounds for divorce, the Pennsylvania legislature has unfortunately not completely resolved the inadequacies of past divorce laws. Although a divorce will now be granted when the marriage is irretrievably broken,⁷⁹ or when the parties have lived separate and apart for three years,⁸⁰ the grounds for divorce based upon the assessment of "fault" were also preserved.⁸¹ It is difficult to understand why the legislature retained the fault grounds, since none of the policy objectives set forth in the Code⁸² are advanced by the in-

78. Act of April 2, 1980, No. 26, 1980 Pa. Legis. Serv. 50.

79. *Id.* § 201(c).

80. *Id.* at § 201(d). See note 104 *infra*.

81. *Id.* §§ 201(a), (b). See note 20 *supra*.

82. Section 102, which sets forth the legislative findings and intent, provides as follows:

(a) The family is the basic unit in society and the protection and preservation of the family is of paramount public concern. Therefore, it is hereby declared to be the policy of the Commonwealth of Pennsylvania to:

(1) Make the law for legal dissolution of marriage effective for dealing with the realities of matrimonial experience.

(2) Encourage and effect reconciliation and settlement of differences between spouses, especially where children are involved.

(3) Give primary consideration to the welfare of the family rather than the vindication of private rights or the punishment of matrimonial wrongs.

(4) Mitigate the harm to the spouses and their children caused by the legal dissolution of the marriage.

(5) Seek causes rather than symptoms of family disintegration and cooperate with and utilize the resources available to deal with family problems.

(6) Effectuate economic justice between parties who are divorced or separated and grant or withhold alimony according to the actual need and ability to pay of the parties and insure a fair and just determination and settlement of their property rights.

(b) The objectives set forth in subsection (a) shall be considered in construing provisions of this act and shall be regarded as expressing the legislative intent.

Id. § 102.

clusion of those grounds. In fact, these objectives were the basis of criticism leveled against the fault system. Additionally, by retaining the fault grounds in the new Code, Pennsylvania has also retained all the problems that had become inherent to that system.⁸³

One reason that may have convinced the legislature to retain the fault provisions in the new statute was a desire to avoid turning Pennsylvania into a divorce-encouraging state. Also, it is possible that the legislators did not want a spouse who committed atrocious marital conduct to escape the marriage unscathed. However, the most likely reason that the fault provisions were included is the existence of strong ties between the legislators and organized religious groups in Pennsylvania, who believe that divorce itself is basically wrong.⁸⁴ It may have been politically safe to approve a bill that in some cases would still punish a guilty spouse. In any event, the retention of the fault grounds, coupled with other factors which will be discussed later in this comment,⁸⁵ may in effect necessitate a consideration of marital fault in *every* contested divorce action commenced under the new Code.

A. *The New Grounds*

1. *"Irretrievably Broken" Marriage*

Section 201(c) of the Divorce Code mandates that a divorce shall be granted where the marriage is found to be irretrievably broken. Two conditions must be met before a divorce can be granted under this section. First, ninety days must have elapsed between the filing of the complaint and the granting of the decree; and additionally, each spouse must sign an affidavit consenting to the divorce.⁸⁶ By adding this sec-

83. See notes 40-77 and accompanying text *supra*.

84. As is pointed out in one recent study:

[T]here is a precarious balance between metropolitan representatives and those from rural or small town areas and the accompanying phenomenon that "liberal" urban representatives abandon progressive attitudes once a cardinal, archbishop, rabbi or other church leader takes a strong stand. When the legislative issue is ERA, planned parenthood or abortion, or a substantial revision of divorce law, we see backsliding by the liberals or progressives from normal political philosophy.

Freed & Foster, *Divorce in the Fifty States: An Overview as of 1978*, 13 FAM. L.Q. 105, 106 (1979) [hereinafter cited as Freed & Foster].

85. See notes 108-110 and accompanying text *infra*.

86. Section 201(c) states:

It shall be lawful for the court to grant a divorce where a complaint has been filed alleging that the marriage is irretrievably broken and 90 days have elapsed from the date of filing of the complaint and an affidavit has been filed by each of the parties evidencing that each of the parties consents to the divorce.

Act of April 2, 1980, No. 26, § 201(c), 1980 Pa. Legis. Serv. 51.

tion, Pennsylvania joins the majority of the states that have implemented no-fault divorce provisions.⁸⁷ The use of the "irretrievably broken" standard has been so widely accepted that attacks on this provision are unlikely to be sustained.⁸⁸ Not only did this provision meet little opposition when the bill was being considered in the Pennsylvania legislature, but the staunchest opponent to the new Code, the Pennsylvania Catholic Conference, gave it conditional approval.⁸⁹

The question which arises in connection with the "irretrievably broken" standard is whether divorces will be granted merely upon the request of the consenting spouses. Section 201(c) allows for no determination of "irretrievably broken" to be made by a court, thus withdrawing any substantive objective values from the phrase.⁹⁰ The result apparently is that divorces will be granted upon request after a ninety-day waiting period, so long as both parties have signed an affidavit attesting to the fact that there is no chance of reconciliation. The effect of such a procedure is yet to be seen, but if the suitability of the spouses for one another and their state of mind toward the marriage is to be controlling under the "irretrievably broken" standard, evaluation by objective criteria would seem to be impossible.⁹¹ It has been stated

87. In 1970, California became the first state to adopt a no-fault divorce provision. CAL. CIV. CODE § 4506 (West 1970). Illinois and South Dakota remain the only two states that do not have some sort of no-fault provisions. See FAM. L. REP. (BNA) 401-453 (Ref. file 1980).

88. See Comment, *Abolition of Guilt in Marriage Dissolution: Wisconsin's Adoption of No-Fault Divorce*, 61 MARQ. L. REV. 672, 681-82 (1978) [hereinafter cited as *Abolition of Guilt*], where the author points out that no-fault statutes have survived attacks based on: impairment of contractual rights, due process violations because of indefiniteness and vagueness, deprivation of vested rights, and impairing the discretion of the court because all the factors of the breakdown are not brought out.

89. Pennsylvania Catholic Conference, *Upholding Marriage and Family Life: Testimony On Senate Bill 450 and House Bill 640*, at 21 (presented to Senate and House Judiciary Committees, April 25, 1979) ("Further, we can tolerate—though not enthusiastically—a new ground which eliminates adversary proceedings in cases where both parties and the court agree that reconciliation is impossible, provided that such new ground is accompanied by an effective counseling provision") [hereinafter cited as Catholic Conference Testimony].

90. An argument can be made that regardless of a lack of language in section 201(c) dealing with a judicial finding of "irretrievably broken," a judicial finding should be made. Since the preservation of the family is of paramount public concern, see note 82 *supra*, it would appear that the legislators did not intend for a divorce to be granted on merely trivial grounds. Additionally, if neither of the parties request counseling within the ninety-day period provided in section 202(b), time alone will be the sole deterrent to divorces based on frivolous grounds. Finally, since the court is required in some cases under section 201(d) to determine whether there is an irretrievably broken marriage, it seems illogical to conclude that they cannot make a similar determination where both parties consent.

91. *Abolition of Guilt*, *supra* note 88, at 680.

that the simplest proof of marital breakdown is that both spouses attest to the fact that realistically it is no longer possible for them to live as husband and wife.⁹² Even in those states where the determination of whether a marriage is irretrievably broken is left to the judge, the court procedure itself tends to be little more than a formality.⁹³ Since the two consenting spouses could always fabricate incidents just as they would have under the fault grounds, the only way irretrievable breakdown will not be found by the court to exist is if the parties' story is "tentative or incredible."⁹⁴ Consequently, it is of little significance exactly how a determination is made that the marriage is terminated under this section for, since both spouses are consenting, the result will be the same.

What is of significance concerning section 201(c) is its improvement of the fault system. As expected, the irretrievable breakdown criteria does lessen the feeling of animosity between the parties.⁹⁵ Additionally, under this section there is a greater possibility that the marriage is actually "dead." Under the fault system, if the grounds were met a divorce was granted regardless of the possibility of reconciliation. The no-fault ground, on the other hand, allows the parties to examine this marriage over a period of time in an unemotionally charged atmosphere to determine if, in fact, their marriage cannot be salvaged.⁹⁶ However, the "irretrievably broken" standard is not a cure-all for all bitterness associated with the termination of marriage. It has been found that while the bickering associated with the divorce proceeding itself has subsided, the antagonism has now shifted to the areas of custody and support.⁹⁷

So, while section 201(c) may at first glance appear to be a radical departure from the old divorce law, in actuality it is not so different. While parties no longer are required to satisfy a certain fault ground to obtain a divorce, the collusion which existed under the fault system is merely legitimized⁹⁸ by section 201(c) to the benefit of all involved.

92. *Adams v. Adams*, 238 Ga. 326, 232 S.E.2d 919 (1977).

93. In Nebraska, where there is a judicial determination of irretrievable breakdown even where both parties consent to the divorce, the average length of such a judicial hearing is sixteen minutes. Frank, Berman & Mazur-Hart, *No-Fault Divorce and the Divorce Rate: The Nebraska Experience—An Interrupted Time Series Analysis and Commentary*, 58 NEB. L. REV. 1, 55 (1978) [hereinafter cited as *The Nebraska Experience*].

94. *Id.* at 62-63.

95. *Id.* at 49.

96. *Id.* at 54-55.

97. *Id.* at 51.

98. See *In re Marriage of Collins*, 200 N.W.2d 886, 890 (Iowa 1972), where the Supreme Court of Iowa viewed the parties' collusive attempt to terminate the marriage as strong evidence of the marriage breakdown.

2. *Three Year Separation-Unilateral Provision*

Section 201(d) of the new Code was by far the most controversial provision, and was opposed most vehemently by the Pennsylvania Catholic Conference. The main thrust of the Catholic Conference's argument was that a unilateral provision would not only negate the permanence of marriage and actually promote divorce by desertion,⁹⁹ but that it would also allow an innocent spouse who opposes the divorce to have his or her marriage terminated without an opportunity to assert a defense to such action.¹⁰⁰ Proponents of a separation period argue that not only will it deter migratory divorces, but also that it is consistent with the commonwealth's policy of dealing with the realities of the matrimonial relationships, and that in reality a viable marriage cannot exist where the parties have lived separate and apart for such a length of time, even if one spouse insists that the marriage is not dead.¹⁰¹ Section 201(d) at first glance appears to be a middle ground between these two opposing views, but in actuality will prove to be a victory for those opponents of unilateral divorce.

The new Divorce Code mandates that a court shall grant a divorce where the parties have lived separate and apart for at least three years and the marriage is irretrievably broken.¹⁰² If both spouses agree

99. Catholic Conference Testimony, *supra* note 89, at 11, 14-15.

100. *Id.* at 22. The argument that no-fault divorce leads to an increase in divorce rates was refuted in one recent study, in which the authors, in discussing the effect of no-fault provisions to divorce statistics in Nebraska, concluded:

In repealing Nebraska's fault divorce laws and substituting a procedure based on the irretrievable breakdown of the marriage, the Nebraska Unicameral made a fundamental change in the state's official outlook towards marriage, divorce and the family. That such a dramatic shift in philosophy produced no statistically significant change in the state's overall divorce rate and brought about few substantial alterations in the manner in which divorces are procured serves to demonstrate the inconsiderable impact that the statutory grounds of divorce have on marriage stability. While the divorce rate has skyrocketed in recent years, this phenomenon is better explained as the product of the same social forces that produced no fault divorce laws than as the result of such laws. When the virtues of patience, understanding, and sacrifice are held in higher regard than they are in today's inward-looking society, perhaps the divorce rate will drop significantly.

The Nebraska Experience, *supra* note 93, at 93.

101. As stated in one study:

Granting divorce, even over objection, best serves the state's goal of maximizing individual freedom. Denial of divorce means that both parties, though no longer a viable marital unit, are denied the freedom to establish meaningful new as well as residual family relationships. Granting divorce, on the other hand, frees each individual to decide to marry or not to marry, even to decide to remarry one another.

Goldstein & Gitter, *supra* note 1, at 86.

102. It is also important to note that while it is unclear whether or not a spouse must abandon the marital home in order to be living separate and apart, see note 112 *infra*, the

that these two criteria have been met, the court must grant the decree. But if one spouse disagrees with either of these two criteria then the court, after a hearing, will determine whether the three-year period was met,¹⁰³ and whether or not the marriage is irretrievably broken.¹⁰⁴ If the court determines that the marriage is not irretrievably broken, then it will continue the matter for a period of three to six months during which time counseling for the parties may be ordered.¹⁰⁵ Finally, at the end of such a continuation period, if one spouse still insists that the marriage is dead and the other denies it, the court again will determine whether or not the marriage is irretrievably broken. If the court concludes that the marriage is irretrievably broken, a divorce will be granted; otherwise it will be denied.¹⁰⁶

Supreme Court of Rhode Island has held that the fact that the parties are living in the same house is not a controlling factor in determining if there is an "irremediable breakdown of the marriage." *Flynn v. Flynn*, 388 A.2d 1170 (R.I. 1978). Therefore, if the Pennsylvania courts interpret the separate and apart provision to be satisfied even if the spouses remain in the same house, it would follow that they could not deny the divorce under the irretrievably broken standard of that same provision merely because of a failure to live in different houses.

103. Pennsylvania did not include language such as "consecutive," "without interruption," or "continuously . . . immediately prior to the commencement of the action," in describing the three-year period. See Act of April 2, 1980, No. 26, § 201(d), 1980 Pa. Legis. Serv. 51. Compare this provision to VT. STAT. ANN. tit. 15, § 551(7) (1974); VA. CODE § 20-91(9)(a) (1975); WIS. STAT. ANN. § 247.12(2) (West Supp. 1979). Such an exclusion could have two ramifications. First, the three-year separation period need not immediately precede the filing of the complaint. The parties can attempt a reconciliation after the period is reached and still obtain a divorce as long as the finding of no reasonable prospect of reconciliation and the separation period have a sufficient nexus. See *Brittner v. Brittner*, 124 N.J. Super. Ct. 259, 306 A.2d 83 (1973). Second, it is unclear whether the three-year separation period must be consecutive in Pennsylvania. The new Code does not resolve whether a divorce will be granted after a four-year period in which three years have been years of complete cessation of any and all cohabitation, but where one intervening year was not. Since the year of cohabitation would show a tendency for there to be reconciliation within the three-year period, the possibility of a plaintiff's success would seem slight. Yet, this result is not expressly required by the statutory language. It is not clear whether the legislators were actually intending to provide for some minimal amount of reconciliation time which would not terminate the three-year period. See note 113 *infra*.

104. Act of April 2, 1980, No. 26, § 201(d)(1), 1980 Pa. Legis. Serv. 51. This is a major change from the original bill which passed the Pennsylvania House of Representatives on October 17, 1979. See H.B. 640, Pa. Legis., 1979 Sess. Section 201(d)(1) of that bill stated that where one of the spouses alleged that a three-year separation period had been fulfilled and that the marriage was irretrievably broken, the court was obligated to grant the divorce as long as the allegations of the moving spouse were corroborated by one witness other than the parties to the divorce, and ninety days had elapsed from the date of the filing of the complaint. The court played no role in the determination of the two criteria whatsoever. *Id.*

105. *But see* note 119 *infra*.

106. Act of April 2, 1980, No. 26, § 201(d)(2), 1980 Pa. Legis. Serv. 51.

This section markedly changes the original version of the Code passed by the Pennsylvania House of Representatives, which precluded any court determination as to whether the marriage was irretrievably broken where sufficient evidence demonstrated that a three-year separation had in fact occurred.¹⁰⁷ Not only does this new section add even more time to the divorce proceeding, but it practically insures that a three-year separation period will be seldom utilized as a divorce ground in Pennsylvania.

This conclusion is based upon the two problems which plague this unilateral section, the most important being that the separation period is much too long.¹⁰⁸ After a three-year period of separation, the parties probably would be adjusted and committed to living apart.¹⁰⁹ The emotional and economic toll of waiting so long will prove to be too prohibitive, and the result will be a return to the fault grounds in an attempt to obtain a speedier disposition.¹¹⁰ Such a long waiting period will also tend to extinguish any notion of reconciliation on the part of the spouse seeking the divorce.¹¹¹ Since the statute requires that the separation be for three years with "complete cessation of any and all cohabitation,"¹¹² if any serious attempt at reconciliation during this period failed, the spouse would have to begin to calculate the period over again.¹¹³ While this burden would not preclude many from

107. See note 104 *supra*.

108. *The Nebraska Experience*, *supra* note 93, at 47 n.180. Of the twenty-four states that have living separate and apart provisions, only five have three-year statutes and only Idaho has one longer than three years—five years. The other states run from a period of six months (Vermont, Delaware) to two years (Hawaii, Louisiana). FAM. L. REP. (BNA) 401-453 (Ref. File 1980).

109. Foster, *An Honest Ground for Divorce in Pennsylvania*, 34 PA. B.A.Q. 646, 650 (1963) (citing the 1963 *Report of the New Jersey Supreme Court's Committee on Conciliation and Reconciliation*) [hereinafter cited as *Honest Ground*].

110. *Honest Ground*, *supra* note 109, at 648.

111. *The Nebraska Experience*, *supra* note 93, at 47 n.180.

112. Act of April 2, 1980, No. 26, § 104, 1980 Pa. Legis. Serv. 51. While the Code defines separate and apart as a complete cessation of cohabitation, the Code does not define cohabitation. Whether the two parties can remain in the same house and still not be cohabitating is not answered. New Jersey requires by statute that the spouses live in different habitations. N.J. STAT. ANN. § 2A:34-2 (West Supp. 1980). Delaware statutorily permits the spouses to reside in the same house, though in different bedrooms, and still qualify under the separate and apart ground. DEL. CODE ANN. tit. 13, § 1503(7) (Supp. 1978). See also *Heckman v. Heckman*, 245 A.2d 550 (Del. 1968). Finally, Missouri, although not defining separate and apart, allows a unilateral divorce to be granted where the two parties have lived separate and apart for two years. MO. ANN. STAT. § 452.320(2)(1)(e) (Vernon Supp. 1980). This section has been judicially interpreted to allow a divorce to be granted even if the two spouses living "separate and apart" reside in the same house. See *In re Marriage of Uhls*, 549 S.W.2d 107 (Mo. App. 1977).

113. See note 103 *supra*. *Contra*, DEL. CODE ANN. tit. 13, § 1505(e) (Supp. 1978). The Delaware statute provides:

attempting reconciliation if the separation period were only six months, a three-year period is much more formidable and will effectively eliminate any reconciliation attempt. The second factor which insures that section 201(d) will be seldom utilized is the possibility that after the three-year period, the court still may not grant a divorce. If the court is going to rule on whether the marriage is irretrievably broken even after the three-year period has expired, why have the separation period at all? Since the separation period would seem to be only one element of evidence¹¹⁴ to support the moving spouse's position, if he has enough evidence to support his position without the intervening three years, why not allow him to obtain the divorce quickly? Such a procedure would eliminate the possibility that an unscrupulous spouse could delay a final decree even after the separation period had run and even though he does not actually have grounds to prevent the divorce.¹¹⁵ Additionally, if there is going to be a contest in court for the divorce, this defeats one of the purposes of unilateral no-fault divorce, which is to avoid this traumatic experience. Therefore, since a spouse would be required to wait three years for a divorce which was not guaranteed, and then could still be subjected to the rigors of a court battle, the fault grounds become much more desirable and the unilateral provision loses its initial appeal.

Ideally, the commonwealth should have a unilateral no-fault provision. Living apart for a specific length of time would seem to be objective proof that the marriage has failed in the eyes of at least one spouse, and that essentially only a facade of a marriage would remain if the parties were forced to remain married.¹¹⁶ Pennsylvania has not adhered to this principle and because of an unnecessarily long separation period coupled with a court determination of irretrievable break-

Bona fide efforts to achieve reconciliation prior to divorce, even those that include, temporarily, sleeping in the same bedroom and resumption of sexual relations, shall not interrupt any period of living separate and apart, provided that the parties have not occupied the same bedroom, or had sexual relations with each other within the 30 day period immediately preceding the day the Court hears the petition for divorce.

Id.

114. New Jersey has determined that where the separation period exceeds the required eighteen months, there shall exist a *presumption* that the spouses are without any reasonable prospect of reconciliation. N.J. STAT. ANN. § 2A:34-2(d) (West Supp. 1979). See also Dunston v. Dunston, 124 N.J. Super. Ct. 214, 305 A.2d 813 (1973) (presumption which arises after eighteen-month separation period does not create a vested right to a divorce if subsequent conduct is violative of the wording of the statute). Wisconsin has determined that a twelve month separation period is an *irrebuttable presumption*. WIS. STAT. ANN. § 247.12 (West Supp. 1979).

115. See *The Nebraska Experience*, *supra* note 93, at 76.

116. See Goldstein & Gitter, *supra* note 1, at 78.

down at the conclusion of the three-year period, the section will be used sparingly, if at all.¹¹⁷

B. *Counseling*

Perhaps no other provision of the Divorce Code demonstrates as convincingly Pennsylvania's adherence and belief in its policy of family preservation as that involving counseling. Section 202 provides that when either the mutual consent no-fault ground or the fault ground of indignities is asserted as grounds for divorce, the court shall, upon request of one of the parties, require up to three counseling sessions during the ninety-day waiting period.¹¹⁸ The section also requires counseling if the unilateral provision is utilized as a ground for divorce, but only when one spouse denies that the marriage is irretrievably broken and the court finds that there is a reasonable prospect of reconciliation.¹¹⁹ Finally, the court may require counseling, without the request of one of the spouses, where the parties have at least one child under sixteen years of age.¹²⁰ Substantially similar counseling provisions in other states have proved to be extremely beneficial.¹²¹ Additionally, at

117. This conclusion may not be valid during the early period of the Code. The new Divorce Code states that:

The provisions of this act shall apply to all cases, whether the cause for divorce or annulment arose prior or subsequent to enactment of this act. The provisions of this act shall not affect any suit or action pending, but the same may be proceeded with and concluded either under the laws in existence when suit or action was instituted, notwithstanding the repeal of such laws by this act, or, upon application granted, under the provisions of this act.

Act of April 2, 1980, No. 26, § 103, 1980 Pa. Legis. Serv. 50. The effect of this section will be that spouses who have lived separate and apart for three years or more could get an immediate divorce if both consented, or if one spouse objected and the court found the marriage to be irretrievably broken. Those parties who have lived separate and apart for less than three years would only have to wait a period of time equal to the difference between the three years and the time already spent separated, before filing a petition for divorce.

118. *Id.* § 202(a), (b). It appears that the counseling provision will be used infrequently with regard to indignities, because it is not mandatory and accusations by one party against the other will tend to widen the gap between the spouses rather than bring them closer together.

119. *Id.* § 202(c). Although this section provides that counseling shall be required where either of the parties request it, a possible argument could be made that the requirement is mandatory since § 201(d)(2) states that the court "shall require counseling as provided in section 202." Neither the section dealing with mutual consent nor the indignities section makes any reference to counseling at all. Additionally, it would seem logical to impose such a mandatory provision since it has been more than three years of separation and the court has found there to be a prospect of reconciliation; the court never makes such a determination with the other two grounds.

120. *Id.* § 201(c).

121. Maricopa County, Arizona, where a conciliation court has operated successfully

least one commentator has stated that half of the people who file divorce suits might insist that they want a divorce, but, in actuality, are secretly hoping that someone will straighten out the situation before the final decree is issued.¹²²

Theoretically, a conciliation provision can only be viewed as advantageous. In practicality, however, section 202 presents problems which could frustrate the attainment of the desired result. Initially, if one party requests conciliation the court must require either one, two or three sessions within ninety days.¹²³ However, there is no provision which requires the other spouse to attend these sessions. It has been recognized that where only one spouse from a weak marriage attends counseling sessions, divorce is often the result; in contrast, joint counseling could strengthen the marriage.¹²⁴ If the counseling sessions are to have any potential for effecting a reconciliation, it is necessary for both spouses to participate. Therefore, when counseling is requested by one of the parties, the court should require the non-requesting spouse to also attend, perhaps by use of its subpoena or citation power.¹²⁵

Compulsory conciliation may also alleviate another problem associated with marriage counseling. Many people tend to distrust counseling; this distrust is frequently based upon pride.¹²⁶ Compulsory conciliation would not be so distasteful to a party since it is the judge, not the litigant, who feels that the counseling is necessary.

Unfortunately, the counseling provision as presently drafted may prove to be a method for effecting reconciliation that is not available to the poor. The court is only required to supply the parties with a list of qualified professionals. The parties must pay the price for counseling sessions, which do not come cheaply. Therefore, section 202 will have little or no effect on the lower economic classes, since most couples will be financially foreclosed from utilizing the provision. The only way to preclude this result is to integrate the counseling services

since 1965, reported that in the thirteen-year period between 1965 and 1978, 7,486 couples with marital difficulty were reconciled. Additionally, in that same county, during 1976-1977, forty-eight percent of all couples who petitioned for counseling were reconciled and ninety percent of these couples were still living together one year later. Catholic Conference Testimony, *supra* note 89, at 7.

122. See *Honest Ground*, *supra* note 109, at 167 n.4.

123. Act of April 2, 1980, No. 26, § 202(b), 1980 Pa. Legis. Serv. 51.

124. Bodenheimer, *New Approaches of Psychiatry; Implications for Divorce Reform*, 1970 UTAH L. REV. 191, 205 [hereinafter cited as *Implications for Divorce Reform*].

125. See PA. R. CIV. P. 4018.

126. McLaughlin, *Court-Connected Marriage Counseling and Divorce—The New York Experience*, 11 J. FAM. L. 517, 526 (1971).

into the court system, with the commonwealth assuming the expense, as has been done in numerous states.¹²⁷

Finally, it should be noted that the use of the counseling provision in association with the three-year separation statute will be almost nonexistent. The longer the parties are apart, the more likely it is that they would grow accustomed to such an arrangement, thereby decreasing the chances of reconciliation.¹²⁸ While adoption of a two-year statutory period might present the same problem, the chances of reconciliation would increase to some extent with the decrease in the separation periods. Consequently, while the drafters of the Divorce Code should be applauded for including a conciliation provision, some adjustments need to be made before a truly beneficial program can be presented. Compulsory conciliation combined with a court integrated system should be sufficient to give real meaning to the commonwealth's policy of encouraging and effecting reconciliation and settlement of differences between spouses.

C. *Alimony*

Prior to the enactment of the new Divorce Code, it was possible for a wife, regardless of the length of the marriage, to be left without a means of support and without the marital abode, as a result of a successful divorce action by her spouse in Pennsylvania. This was due to Pennsylvania's long-standing refusal to award alimony pursuant to a decree of absolute divorce.¹²⁹ Pennsylvania stood alone as the only state in the nation which adhered to such a policy. The underlying rationale for this policy was that of equality; all parties should be on the same basis when the marriage is terminated.¹³⁰ This policy appears to make little sense in a state where fault was the only ground for divorce, for alimony was denied to a guilty as well as an innocent

127. Many states, including Arizona, California, Wisconsin and Utah, have court affiliated counseling services. ARIZ. REV. STAT. ANN. § 25-381.01 to .21 (1976); CAL. CIV. PROC. CODE §§ 1760-1772 (West 1972 & Supp. 1980); WIS. STAT. ANN. § 247.081 (West Supp. 1979); UTAH CODE ANN. § 30-3-17 (1976).

128. See *Honest Ground*, *supra* note 109, at 650 (citing the 1963 REPORT OF NEW JERSEY SUPREME COURT'S COMMITTEE ON CONCILIATION AND RECONCILIATION).

129. Pennsylvania permitted alimony to be awarded in four situations: during the pendency of a divorce proceeding, pursuant to a divorce from bed and board, where respondent is insane or suffers from a serious mental disorder. PA. STAT. ANN. tit. 23, §§ 45-48 (Purdon 1955).

130. *Hooks v. Hooks*, 123 Pa. Super. Ct. 507, 512, 187 A. 245, 247 (1936) ("It is apparent that the legislative policy has been, more and more, to place husband and wife, in matters of divorce, in the same position, and we are of the opinion that it is the present legislative intent to put all parties, to whom an absolute divorce is or has been granted, on the same basis").

spouse. Nevertheless, Pennsylvania's legislators believed that returning the parties to their single status without ensuing financial obligations was paramount to any policy which would tend to utilize alimony as a punitive measure.¹³¹ By excluding alimony from its divorce procedure, Pennsylvania actually encouraged the use of the migratory divorce techniques. A spouse could obtain a divorce rather quickly and avoid all financial obligations to his family upon his return. This invariably would lead to an increase in the state's taxes, since a large number of these dependents must receive public welfare.

With the application of the new Divorce Code, these problems should be alleviated. The policy of this commonwealth will shift from one of equality of the parties after dissolution to an attempt to effectuate economic justice between the spouses.¹³² Even where one spouse obtains a migratory divorce, the new Code allows the remaining spouse to petition the court for alimony; upon a showing of need, if the other spouse is present in the state or if his property is present, the court may grant alimony.¹³³ Not only are the dependent spouse and children protected, but this alimony provision may actually be a deterrent to divorce since the spouse must now pay the price for his action.

Under the new Code, a court may allow alimony if the party seeking it lacks sufficient property and is unable to support himself through employment.¹³⁴ Alimony will not be automatic, for the statute sets forth fourteen factors to be considered, not only in determining whether alimony should be granted but also in determining the nature, amount and duration of the payments. These factors include the earning power and ages of the parties, as well as the relative needs of the parties and marital misconduct.¹³⁵ By inserting these factors into the

131. In actuality, the harshness of the no alimony rule was circumvented to some extent by the fact that in most divorce cases a settlement agreement would be negotiated and executed, and then the case would proceed, uncontested, ending with a decree. However, there was no judicial method to force the spouse to pay, and upon default, the other spouse had to commence a contract action to obtain the money. Recovery of the money was hampered by the fact that Pennsylvania's Civil Procedural Support Law specifically excludes attachment of a defaulting spouse's wages in such a situation. See PA. STAT. ANN. tit. 62, § 2043.39 (Purdon 1968). If one party obtained a migratory divorce, however, Pennsylvania was required to honor the divorce and the wife was effectively left to support herself since in these situations a settlement agreement most often was not even considered.

132. Act of April 2, 1980, No. 26, § 102(a)(6), 1980 Pa. Legis. Serv. 50.

133. *Id.* § 505.

134. *Id.* § 501(a)(1), (2).

135. Section § 501(b) states:

In determining whether alimony is necessary, and in determining the nature, amount, duration, and manner of payment of alimony, the court shall consider all relevant factors including:

(1) The relative earnings and earning capacities of the parties.

Divorce Code, the drafters have specifically attempted to guide the judges to an equitable alimony award. However, the purpose of the alimony award is rehabilitative; that is, payments will be made for a reasonable time so as to allow the party seeking them to meet his or her needs by obtaining employment or acquiring appropriate employable skills.¹³⁶ In conflict with this function of alimony is the requirement that the judge consider the marital fault of the parties.¹³⁷

(2) The ages, and the physical, mental and emotional conditions of the parties.

(3) The sources of income of both parties including but not limited to medical, retirement, insurance or other benefits.

(4) The expectancies and inheritances of the parties.

(5) The duration of the marriage.

(6) The contribution by one party to the education, training or increased earning power of the other party.

(7) The extent to which it would be inappropriate for a party, because said party will be custodian of minor child, to seek employment outside the home.

(8) The standard of living of the parties established during the marriage.

(9) The relative education of the parties and the time necessary to acquire sufficient education or training to enable the party seeking alimony to find appropriate employment.

(10) The relative assets and liabilities of the parties.

(11) The property brought to the marriage by either party.

(12) The contribution of a spouse as a homemaker.

(13) The relative needs of the parties.

(14) The marital misconduct of either of the parties during the marriage; however, the marital misconduct of either of the parties during separation subsequent to the filing of a divorce complaint shall not be considered by the court in its determinations relative to alimony.

Id. § 501(b).

136. *Id.* § 501(a)(1), (2), (b)(9). See also *Brueggemann v. Brueggemann*, 551 S.W.2d 853 (Mo. 1977). In *Brueggemann* the court, interpreting an alimony statute similar to § 501, stated:

To logically proceed under the statute, the trial judge must make a threshold determination of the reasonable needs of the spouse seeking maintenance. Only then can the judge know whether any maintenance is necessary. The difficulty is that the statute seemingly offers no guidance to the trial judge in making this determination. In our opinion the term "reasonable needs" must be defined in terms of the policies embodied in the new dissolution law.

Id. at 856. The court went on to find that it may be possible in some situations, where the homemaking spouse has been away from the job market for a long period of time, to put greater emphasis on the standard of living during the marriage and the duration of the marriage rather than the rehabilitative aspect.

137. As of 1978, sixteen states specifically excluded marital fault from alimony, twelve considered it a discretionary factor, and ten made it an automatic bar to an award. The remaining states made no mention of it in their alimony statute. See *Freed & Foster, supra* note 84, at 114. The argument for inclusion of the fault criteria is that a guilty spouse should not be able to destroy the marriage and then obtain support from the innocent spouse. Additionally, since the alimony hearing is separate and apart from the divorce proceeding itself, the commonwealth can still adhere to no-fault divorce while

While the courts of other jurisdictions which have a similar fault provision have stated that alimony awards are not to be considered as punishment for the spouse at fault,¹³⁸ this might be easier said than done in Pennsylvania, where fault has governed divorce thinking for almost two hundred years. Many judges may concentrate more on the fault asserted than upon the financial needs of the parties. Moreover, sympathy and undue generosity for the wronged party may very well be the result of admitting fault evidence.¹³⁹ Another problem with this fault finding requirement is that the Code leaves unanswered the question of whether the marital misconduct could ever reach a level that would bar alimony altogether. Although such a conclusion could be reached under the new Code,¹⁴⁰ it would appear to be inconsistent with the idea of rehabilitative alimony. Not only could the spouse be left without any funds to enable her to ease back into the work force but if the purpose of the alimony chapter in the Code is to effectuate economic justice between the parties so as to allow a clean break from the marriage in a financially agreeable way, such a result would not fulfill these purposes. Therefore, it is unfortunate that marital misconduct was included in the new Code as a factor for the judges to consider in determining the alimony award.

allowing it in alimony. The argument against considering fault is that because the divorce laws in most states now include no-fault provisions, the state is no longer an interested third party and therefore alimony should be considered not as punishment, but, rather, solely as a social welfare mechanism. Also, since the state has only a formalistic role in the divorce proceeding and its involvement in the marriage contract has been terminated upon divorce, alimony is awarded as a duty which attached to the spouses at the time the marriage contract was entered into. Therefore, since the legislature has determined that fault should not apply to the divorce, this would also include the duty of alimony which attached prior to the divorce. Finally, it has been postulated that by considering fault in alimony, the bitterness and hatred that was avoided by implementing no fault divorce comes in through the back door. See *No-Fault Alimony*, *supra* note 43, at 496-97.

138. *Tobey v. Tobey*, 165 Conn. 742, 345 A.2d 21 (1974); *Meyer v. Meyer*, 394 A.2d 1220 (Md. Ct. Spec. App. 1978); *Jacobs v. Jacobs*, 254 S.E.2d 56 (Va. 1979).

139. Note, *The Economics of Divorce: Alimony and Property Awards*, 43 U. CIN. L. REV. 133, 144 (1974) [hereinafter cited as *Economics of Divorce*].

140. In Maryland, while alimony can be awarded to either spouse, the factors upon which judges rely in determining alimony awards have been judicially expounded. The factors which are to be considered are the circumstances of the parties, their station in life, their age and physical condition, ability to work, duration of the marriage, circumstances leading to divorce, and fault which destroyed the marriage. *Moore v. Moore*, 36 Md. App. 696, 375 A.2d 37 (1977). The court in *Moore* held that "when the actions of the party seeking alimony are the sole cause of the destruction of the marriage, and the wrongdoing consists of acts so serious that they can constitute grounds for an absolute divorce, alimony must be denied unless there are extremely extenuating circumstances." *Id.* at 699, 375 A.2d at 40. See also *Rhoad v. Rhoad*, 273 Md. 459, 330 A.2d 192 (1975); *Flanagan v. Flanagan*, 270 Md. 335, 311 A.2d 407 (1973).

Notwithstanding the fact that marital misconduct will be considered, the idea of rehabilitative alimony is an admirable one. While the Code permits the judges to fix the duration of the award generally, alimony will not be permanent but will last only until the recipient obtains appropriate employment or develops an appropriate employable skill, in the absence of extraordinary circumstances.¹⁴¹ This will have the effect of requiring the judges to focus upon the individual's needs, and therefore supports the argument that fault criteria should not be considered when awarding alimony. The defendant spouse is forced to become self-supportive¹⁴² and the payor spouse is not permanently shackled with a financial obligation. Additionally, the bitterness which may exist between the parties can only amplify when continuous monthly alimony payments must be made.¹⁴³ Rehabilitative alimony will not prolong such bitterness. Finally, this provision may act as a deterrent to those spouses who are willing to easily "give up" on their marriage because of an expectation of permanent support.

For those ex-spouses who attempt to improve their financial situation without rehabilitating themselves, by cohabitating, the Divorce Code poses a significant obstacle. While an ex-spouse's cohabitating with a person of the opposite sex has troubled other states,¹⁴⁴ Pennsylvania makes it an absolute bar to an alimony award. Until this point, the alimony chapter in the Divorce Code had been drafted with almost precise clarity, but here the legislature fell far short of that mark. Although a petitioner for an alimony award will be barred from such award where he or she "has entered into cohabitation with a per-

141. Act of April 2, 1980, No. 26, § 501(c), 1980 Pa. Legis. Serv. 58. This section must be coupled with section 501(b)(9) which states that the court must take into consideration the time necessary to acquire sufficient education or training to find appropriate employment. *Id.* § 501(b)(9). Even where a party has a college degree, § 501(b)(9) may still come into play. An Illinois Appellate Court has upheld a grant of \$500 per month to a wife, who had an undergraduate degree in zoology, to obtain a graduate degree in library science. The court considered the fact that the wife had never worked in the field of zoology and had not held any substantial employment since her marriage. Since the opportunities were better for her in the field of library science and the husband was well able to pay the \$500 per month, the court upheld the award. *In re Marriage of Marsh*, 64 Ill. App. 3d 572, 381 N.E.2d 804 (1978). However, educational goals will not always mandate a continuance of alimony. *Lumsden v. Lumsden*, 603 P.2d 564 (Hawaii 1979).

142. See *Brueggemann v. Brueggemann*, 551 S.W.2d 853 (Mo. 1977), where the court stated that the new divorce law imposed an affirmative obligation on the party petitioning for alimony payments to seek employment.

143. *Economics of Divorce*, *supra* note 139, at 59.

144. Since many alimony statutes enacted within the last ten years provided that alimony was to cease upon the death or remarriage of the recipient, the problem arose where the recipient did not remarry, but instead began to cohabit with a person of the opposite sex, a development not addressed by the statutes.

son of the opposite sex,"¹⁴⁵ nowhere in the Code is cohabitation defined. Apparently, the legislators presupposed that there could be but one type of cohabitation. However, some parties may cohabit for a short period of time with no pooling of assets and with retention of different surnames, while others may cohabit for a long time under the same surname and with a pooling of assets, thus establishing a *de facto* marriage.¹⁴⁶ The consequences for alimony payment should differ in each case, but the Divorce Code does not acknowledge such a distinction.¹⁴⁷ If the support *needs* of the cohabiting ex-spouse are considered, the first situation would in some instances require that alimony still be paid, while in the second situation, alimony should properly be terminated.

The present statute should be amended to include a more equitable provision, perhaps creating a rebuttable presumption that the ex-spouse is being supported by his or her cohabitant.¹⁴⁸ Another approach suggests that if the two cohabitants have lived together for a sufficient amount of time and their combined income is equitably high enough, or if a *de facto* marriage exists, then the alimony payments should be suspended in the former case and terminated in the latter.¹⁴⁹

145. Act of April 2, 1980, No. 26, § 507, 1980 Pa. Legis. Serv. 60. While the language of § 507 is a bit obscure, it presumably covers both the situation in which the spouse is cohabiting at the time of the divorce and alimony proceeding, and the case in which the spouse decides to cohabit after receiving alimony for an extended period of time. If the legislature did not intend to cover the latter situation, then the wording of § 501(e) should be amended to encompass it, unless it is found to be a change in circumstances which permits modification.

146. Oldham, *The Effect of Unmarried Cohabitation By A Former Spouse Upon His or Her Right to Continue to Receive Alimony*, 17 J. FAM. L. 249, 252 (1978-79) [hereinafter cited as *Unmarried Cohabitation*]. For cases where the ex-spouse was deemed to be cohabiting, see *Ivey v. Ivey*, 378 So.2d 1151 (Ala. Ct. App. 1979); *Parish v. Parish*, 374 So.2d 348 (Ala. Ct. App. 1979); *Taake v. Taake*, 75 Wis.2d 115, 233 N.W.2d 449 (1975). For cases in which courts have concluded that no cohabitation existed, even though the ex-spouse was residing with a member of the opposite sex, see *Ethridge v. Ethridge*, 379 So.2d 87 (Ala. Ct. App. 1979); *In re Bramson*, 6 Fam. L. Rep. 2486 (Ill. App. Ct. 1980).

147. As recognized by one commentator, this is probably "the result of both moral outrage at the cohabiting ex-spouse and the misguided belief that the other cohabitant will always support the ex-spouse." *Unmarried Cohabitation*, *supra* note 146, at 254. That same commentator also posits that "[s]uch a view could also stem from a belief that a support obligation should automatically stem from any unmarried cohabitation, regardless whether a quasi-marital commitment is contemplated. This view is not consistent with the expectation of a significant number of unmarried cohabitants." *Id.* at 254 n.23.

148. Such a statute has been enacted in California. See CAL. CIV. CODE § 4801.5 (West Supp. 1978). This statute has been criticized as discouraging marriage, and encouraging cohabitants to structure their expense so as to cohabit indefinitely.

149. *Unmarried Cohabitation*, *supra* note 146, at 266-67 ("After the alimony recipient has cohabited for a significant length of time, however, the equities may change; it may be more equitable to require the cohabitant, rather than the alimony payor, to support the ex-spouse, even if the cohabitant does not desire to do so").

Regardless of the approach utilized, either would be far more equitable in dealing with the problem of cohabitation than the provision presently included.

Another situation which the Divorce Code fails to consider is that in which the ex-spouse cohabits, but the cohabitation ends before she is self-supporting. Again, the nature of the cohabitation should be examined. If a *de facto* marriage exists, then alimony should not be resumed, since it is the equivalent of remarriage itself, with its ensuing obligations. A strong argument has been made that in such a situation, the cohabitant should assume support payments.¹⁵⁰ Where a *de facto* marriage is not established it makes even less sense to terminate alimony payments forever, since the parties' expectations probably were not to have the financial obligations accompanying marriage attach. Most courts that have considered this "less than *de facto*" marriage situation have permitted alimony to resume after cohabitation has ceased.¹⁵¹ By allowing cohabitation to bar or at least to terminate alimony in all cases, the commonwealth in fact turns away from the major concern of rehabilitative alimony—need—apparently preferring to allow its disdain for the relationship to obscure its vision.

D. *Equitable Distribution of Marital Property*

Under the common-law title standard of distribution, which was utilized in Pennsylvania prior to the passage of the new Divorce Code, each spouse was permitted to keep any property owned in his or her own name at the time of divorce.¹⁵² Property held by the parties as tenants by the entireties was subject to division in equal one-half shares, since the divorce had the effect of making the spouses tenants-in-common.¹⁵³ The inequities present under this system are patently obvious. The new Divorce Code effectively deals with these inequalities by restructuring the entire system of property distribution in Pennsylvania.

150. See Note, *Beyond Marvin: A Proposal for Quasi-Spousal Support*, 30 STAN. L. REV. 359 (1978), where the author proposes that while the notions of express agreements, implied contracts and quasi-contract could be utilized, they all have problems associated with them. A proposed solution is that a presumption of an agreement for quasi-spousal support arise, placing the burden on the *de facto* spouse to disprove cohabitation, when the state has found a *de facto* marriage to exist.

151. See CAL. CIV. CODE. § 4801.5(c) (West Supp. 1978). See also *Garlinger v. Garlinger*, 137 N.J. Super. Ct. 56, 347 A.2d 799 (App. Div. 1975); *Taake v. Taake*, 75 Wis. 2d 115, 233 N.W.2d 449 (1975).

152. However if a property agreement has been entered into pending or prior to the divorce action, the courts will uphold the allocation of property as long as it is fair, free from fraud and not promotive of divorce. See *Droz v. Droz*, 39 D. & C.2d 505 (1965).

153. *Shoup v. Shoup*, 469 Pa. 165, 364 A.2d 1319 (1976).

Section 401(d) mandates that upon request of one of the spouses, the court shall equitably distribute or assign the marital property. Thus, the strict common-law title standard has been rejected. To aid the court in ascertaining what an equitable distribution will be in any given situation, the drafters of the Divorce Code have set forth ten relevant factors for consideration.¹⁵⁴ While most states that follow an equitable distribution theory have similar factors to be considered, Pennsylvania includes two relatively modern considerations: the contribution of one spouse to the education of the other and the contribution of one spouse as homemaker.¹⁵⁵

The drafters, in enacting the first of these two provisions, have attempted to alleviate the situation where one spouse, who has worked to put the other through a professional school, is left with nothing to show for the effort after the divorce. While the working spouse will be protected when there are numerous assets at the time of divorce, the provision seems inadequate to cover the situation where the marriage is of short duration, and few assets have been accumulated.¹⁵⁶ Since the

154. Section 401(d) provides as follows:

In a proceeding for divorce or annulment, the court shall, upon request of either party, equitably divide, distribute or assign the marital property between the parties without regard to marital misconduct in such proportions as the court deems just after considering all relevant factors including:

- (1) The length of the marriage.
- (2) Any prior marriage of either party.
- (3) The age, health, station, amount and source of income, vocational skills, employability, estate, liabilities and needs of each of the parties.
- (4) The contribution by one party to the education, training, or increased earning power of the other party.
- (5) The opportunity of each party for future acquisitions of capital assets and income.
- (6) The sources of income of both parties, including but not limited to medical, retirement, insurance or other benefits.
- (7) The contribution or dissipation of each party in the acquisition, preservation, depreciation or appreciation of the marital property, including the contribution of a party as homemaker.
- (8) The value of the property set apart to each party.
- (9) The standard of living of the parties established during the marriage.
- (10) The economic circumstances of each party at the time the division of property is to become effective.

Act of April 2, 1980, No. 26, § 401(d), 1980 Pa. Legis. Serv. 56.

155. *Id.* § 401(d)(4), (7).

156. See *In re Marriage of Graham*, 194 Colo. 429, 574 P.2d 75 (1978) (court concluded that a working wife, who contributed seventy percent of the financial support of the family while her husband obtained an M.B.A., did not have a property right in the education and, because there were no marital assets accumulated, she was entitled to no property on dissolution of the marriage). However, a working spouse could be protected by the alimony provision, which requires the court to look to contribution made to education. See *Johnson v. Johnson*, 78 Wis. 2d 137, 254 N.W.2d 198 (1977), where the court stated that

non-student had been employed, her chance for alimony is somewhat limited. Yet, the working spouse expended efforts in expectation of future benefits only to receive nothing upon the termination of the marriage. Such a situation could be avoided if either the education or the future earnings were characterized as a divisible asset.¹⁵⁷ Periodic payments similar to alimony could be utilized so as to avoid overburdening the student spouse or permitting undue speculation.¹⁵⁸

By including the homemaker provision, the legislature has evidenced its receptiveness to the growing sensitivities connected with women's rights.¹⁵⁹ However, it appears that the courts will initially encounter certain evidentiary problems in determining what value to place on homemaker services. It is unclear whether it is to be considered equal to the income contributed to the household by the other spouse or only a percentage of that income.¹⁶⁰ Nevertheless, it is a necessary provision if an equitable distribution is to be accomplished.

In distributing the marital property, the courts are prohibited from considering marital misconduct.¹⁶¹ The statute does provide,¹⁶² however, that the court may consider the contribution or dissipation in the value of the marital property by each party. It thus appears that fault

while alimony, property division and support awards may all be distinct awards, they cannot be made in a vacuum; the property division will affect the needs of the spouses and therefore the amount of the other awards.

157. Comment, *Professional Education as a Divisible Asset in Marriage Dissolutions*, 64 IOWA L. REV. 705, 713 (1979) [hereinafter cited as *Professional Education*]. See also *In re Marriage of Horstmann*, 263 N.W.2d 885 (Iowa 1978).

158. *Professional Education*, *supra* note 157, at 716-19. The author suggests that contributions made by one spouse to the education of the other could be analogized to the concept of loans and investments. As the student spouse prospers in the future the non-student spouse could apply to the court for an increase due to changed circumstances. However, this theory conflicts not only with no-fault concepts, which promote a total break from the marriage situation, but also with the idea of rehabilitative alimony which anticipates that after a certain time the payor spouse would be freed from the ensuing financial obligations of the marriage.

159. Actually, the statute is seen as a codification of evolving case law in this area. See, e.g., *Diflorido v. Diflorido*, 459 Pa. 641, 331 A.2d 174 (1975) (court overruled prior common-law precedent and held that to distribute property according to who purchased it would fail to acknowledge the equally important non-monetary contribution of either spouse).

160. See *Wilberscheid v. Wilberscheid*, 77 Wis. 2d 40, 252 N.W.2d 76 (1977) (contribution of a full-time homemaker may be considered "greater than or at least as great as" the contribution of the working spouse upon the division of marital property).

161. Act of April 2, 1980, No. 26, § 401(d), 1980 Pa. Legis. Serv. 56. Note, however, that marital misconduct is considered in determining the alimony award. See notes 135-140 and accompanying text *supra*.

162. Act of April 2, 1980, No. 26, § 401(d)(7), 1980 Pa. Legis. Serv. 56.

evidence will come in through the back door.¹⁶³ One commentator¹⁶⁴ has stated that consideration of contribution or dissipation by the parties is inconsistent with the concepts of no-fault, which reflect an unwillingness to dissect the marital relationship. Therefore, a better resolution of the issue would have been to recognize the presumption that there is equal contribution and dissipation of assets.¹⁶⁵ This method would fulfill the purpose of equitable distribution more completely.

The property to be excluded from distribution is expressly delineated in the Code.¹⁶⁶ The seven categories deal basically with property of an individual and personal nature acquired either before the marriage or during the separation period. Gifts, devises, bequests and certain veteran's benefits are also excluded even if acquired during the marriage. While this section appears to exclude most property which should not be considered "marital property," there is no section excluding personal injury recoveries.¹⁶⁷ Apparently, the legislators were satisfied that a personal injury recovery constituted marital property. At first glance this may appear to be a basic flaw in the new Code, but in reality it is only a partial defect.

It is possible for the damages to be considered as a two-part recovery; an amount for the injury to the person, and an amount for the injury to the marital entity.¹⁶⁸ That part of the recovery which represents income that would have been acquired had the injury not occurred belongs to the marriage and should be subject to distribution, while the money that compensated the spouse for his pain and physical injuries is personal to him and he should be allowed to keep this as his

163. The result arguably would be different if, while the marriage was still viable, the husband invested significant amounts of money with the expectation of making a profit but instead lost the money, as opposed to the situation in which a husband squandered the money intentionally to keep it from his spouse.

164. Hill & Stogel, *supra* note 71, at 375.

165. Since § 401(e)(5) protects a spouse from the fraudulent conveyances by the other spouse prior to the actual divorce proceedings, this suggestion appears all the more appealing. See Act of April 2, 1980, No. 26, § 401(e)(5), 1980 Pa. Legis. Serv. 56.

166. *Id.* § 401(e).

167. An earlier draft of the new Divorce Code contained a section which arguably could cover such personal injury damages. H.B. 640, Pa. Legis., 1979 Sess., § 401(e)(6). That section included in marital property: "Property acquired with, or received in exchange for property acquired with, funds derived from compensation, pensions, income, or other payments received as payment for the loss or impairment of parts or functions of the body of the party who received the payment." *Id.* At first glance the section appeared to be concerned with disability payments, veterans payments or workmen's compensation, since the drafters chose to use the word "payment" rather than "recovery." Considering the purpose of the statute, however, it seems reasonable that personal injury recoveries could have been included. This section was deleted by the Senate before the final draft of the new Divorce Code was passed.

168. See 41 Mo. L. REV. 603 (1976).

separate property.¹⁶⁹ While such a two-part characterization of the recovery may be difficult to accomplish, this difficulty is not insurmountable. Therefore, it is suggested that an applicable section be added to the Divorce Code to include only that portion of the recovery which is personal to the injured party, reserving the remainder of the recovery to be subject to distribution.

With the enactment of the new Divorce Code, equitable distribution of property upon termination of marriage has become a reality. Not only will one spouse not be deprived of his or her fair share, but the Code also provides for enforcement of a distribution decree.¹⁷⁰ The courts are provided with sufficient operational standards to guide them in their decision, and the added requirement that the reasons for the distribution be expressed in writing¹⁷¹ provides added security against arbitrary rulings.

V. CONCLUSION

Divorce is a concept which has confronted many societies over the years. Historically, the law in this area seems to have adopted a circular pattern.¹⁷² The strict family mores of early Rome, which made divorce quite rare, gave way to almost limitless divorce after the fall of the Roman Empire.¹⁷³ During the Middle Ages, divorce again became a rare occurrence due to the strong influence of Christianity, which made divorce based upon marital fault the only divorce available.¹⁷⁴ Today, the trend of the law is toward a more realistic view of the marriage and away from the traditional notions which have grown around the marital relationship.¹⁷⁵

Pennsylvania, by recently enacting a new Divorce Code, has joined the vast majority of states that have broken away from the traditional notions by enacting no-fault divorce provisions. However, Pennsylvania has not gone far enough, and will continue to be plagued by many of the problems associated with the prior divorce law. Specifically, the commonwealth has retained the former fault grounds of divorce, thus encouraging the parties to a divorce based upon the fault grounds to continue to perjure themselves, and permitting the judicial system to

169. *Id.* at 607.

170. Act of April 2, 1980, No. 26, §§ 401(b), 403, 1980 Pa. Legis. Serv. 55-57.

171. *Id.* § 403(d).

172. Bodenheimer, *Reflections on the Future of the Grounds for Divorce*, 8 J. FAM. L. 179, 185 (1968).

173. *Id.*

174. *No-Fault Concept*, *supra* note 40, at 960.

175. See generally Freed & Foster, note 84 *supra*.

continue to condone that perjury.¹⁷⁶ Reconciliation will continue to be difficult under a system in which one spouse must fix the blame for the deterioration of the marriage on the other. Furthermore, by retaining the fault grounds the commonwealth is apparently unwilling to recognize the fact that the destruction of a marriage is seldom the fault of only one of the spouses.¹⁷⁷

However, by the inclusion of the no-fault grounds, the legislators have taken a substantial step in the right direction. Where both spouses agree that the marriage is irretrievably broken, terminating the dead marriage is much more preferable than prolonging the bitterness between the two spouses, with possible adverse effects upon the children.¹⁷⁸ Even where one party disagrees that the marriage is dead, a separation period of three years would surely seem to be substantial objective proof that a viable marriage no longer exists. Yet, Pennsylvania refuses to go this far, and the unilateral provision will probably be of little practical value because of the long period of separation and the necessity for a court determination of whether the marriage is irretrievably broken at the end of the period.¹⁷⁹

The counseling provisions are a necessary ingredient if the mutual consent no-fault ground is to work effectively. Since many people who petition for a divorce may not really want one, but consider it the only possible solution,¹⁸⁰ counseling should serve to preserve many marriages. Its utility when dealing with the grounds of indignities and the three-year separation will be much less, since either an accusatory stage is set or the parties will be more amenable to separate lifestyles. However, two problems can lead to the failure of the counseling provision even when dealing with the mutual consent ground: first the participation by both spouses is not mandatory, and second, the counseling is not court-affiliated, a fact which could make counseling unavailable to the poor. Nevertheless, the counseling provisions make the policy of the commonwealth to preserve the family unit more than mere idle words.

Finally, the new provisions dealing with alimony and equitable distribution were desperately needed, and will significantly alleviate the economic problems associated with divorce. The fact that one spouse might now be financially obligated to the other should drastically reduce the occurrence of the "migratory divorce."¹⁸¹ Additionally,

176. See notes 64-66 and accompanying text *supra*.

177. See notes 41-43 and accompanying text *supra*.

178. See Baum, *A Trial Judge's Random Reflections on Divorce: The Social Problem and What Lawyers Can Do About It*, 11 WAYNE L. REV. 451, 452-53 (1965).

179. See notes 108-115 and accompanying text *supra*.

180. *Implications for Divorce Reform*, *supra* note 124, at 198-99.

181. See notes 58-59 and accompanying text *supra*.

because the alimony in most cases will not be of a permanent nature, the parties can escape the dead marriage and will not be continually shackled with alimony payments. Adding in the fight to obtain an equitable dissolution of the marriage is the fact that courts will now look seriously at the needs of both parties when distributing the marital property. While extensive factors are listed in both areas as a check on the judicial discretion, there do exist a few unresolved issues.¹⁸² In the long run, however, both sections should prove quite beneficial to Pennsylvania's system of family law.

It appears that divorce will always be part of our culture. Efforts have been proposed to stop the rising divorce rate, but most have proved to be either impracticable or unworkable.¹⁸³ Idealistically, divorce should not be necessary in society at all. If the biblical admonition that "What therefore God has put together, let not man put asunder" played a more substantial role in the decision of a man and woman to marry, perhaps more thought would be given to that decision, and to the state of life to which parties to a marriage commit themselves. The rising divorce rate in modern society evidences the unfortunate lack of serious commitment which many couples bring to the marital relationship. In view of the increasing number of marriages that end in bitterness, ill feeling, dissatisfaction, or simple "falling out of love," it is not surprising that most states have reexamined their divorce laws and have incorporated provisions more consistent with modern perceptions of the institution of marriage. Prior to July 1, 1980, Pennsylvania adhered to an antiquated and often hypocritical accusatory system, in which a divorce was unavailable unless there was a finding of "fault" on the part of one of the parties to the marriage. The passage of the new Divorce Code will not alleviate all of the problems associated with the fault system, but it is a significant improvement over the old system. The new Code will permit marriages to be terminated with a minimal amount of pain and bitterness, and will also aid the parties toward achieving a smooth transition to life on their own. Unfortunately, the new Code is not a panacea for all of the problems which relate to the institution of marriage in modern society.

182. See notes 154-173 and accompanying text *supra*.

183. *No Fault Concept*, *supra* note 40, at 970-71. This study posits two alternatives. First, the use of a "trial marriage" is suggested, in which the parties would contract to be married for a trial period and if at the end of that period no children were born, the parties would be free to rescind the contract. If children were born, the contract would automatically be permanently ratified. Second, the study suggests that there should be strongly enforced age requirements before marriage is permitted, coupled with an educational waiting period. The conclusion is that society is probably not ready to accept the first alternative and would reject the second as too restrictive. *Id.*

While the legislature may attempt to alleviate the problems associated with the termination of dead marriages, it apparently is powerless to deal with the more deeply rooted sociological problems which may cause a marriage to die.

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